No. 22535 & 22535-A

MAY 1 ... 1968

United States Court of Appeals for the Ninth Circuit

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

Brief of Appellant Carl M. Taute

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(b) Statement of the Pleadings and Facts Disclosing Federal Jurisdiction.

Appeal from the United States District Court for the District of Montana, Billings Division.

The District Court had and has jurisdiction of the cause by removal proceedings. Plaintiff originally filed his complaint in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone. Defendant removed the cause to the said District Court by timely Petition for Removal and Undertaking for Costs, each duly served, pursuant to Title 28, Sec. 1446, U.S.C.A. The cause was properly removable because it is one of which the said District Court would have had original jurisdiction (Title 28, Sec. 1441(a), U.S.C.A.).

Said Federal District Court has original jurisdiction of the cause by reason of the diversity of citizenship between plaintiff and defendant and because the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs (Title 28, Sec. 1332, U.S.C.A.).

Judgment in the cause, based upon jury verdict, was made and entered on August 16, 1967, in favor of the plaintiff in the sum of $1,052.00 on the first cause of action, and $6,000.00 on the second cause of action, for a total of $7,052.00.

Taute timely made and served a Motion for New Trial as to the first claim in his complaint (Rule 59, Rules of Civil Procedure). Econ-Car also timely made and served its Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial.

Both motions for a new trial were by the Court denied on September 18, 1967. Thereafter, within thirty days Econo-Car served a Notice of Appeal to this Circuit Court of Appeals (Rule 73(a)). Thereafter, within 14 days, to-wit, on October 23, 1967, the Appellant Taute served and filed his Notice of Appeal pursuant to 73(a)(3), Rules of Civil Procedure.

Accordingly both the Federal District Court from which this appeal is taken, and this Appellate Court, had and have jurisdiction in the premises.

(c) Statement of the Case

Econo-Car International, Inc., the defendant named in the original action, is a corporation organized and existing under the laws of the State of New Jersey.

Carl M. Taute, the plaintiff in the original action, is and was at all times pertinent a citizen of the United States, resident of the State of Montana.

In the month of June of 1963, Econo-Car was engaged in the business of car rentals, and for the purpose of promoting itself as a national organization, was offering to persons who were willing to participate, certain franchise agreements whereby the franchisee would rent cars in a certain locality or localities under the name and aegis of Econo-Car Rental System.

Taute, who resided in Billings, Montana, got involved with Econo-Car when he answered an advertisement in a local paper which offered a franchise of a discount type rental operation built on the use of Chrysler automobile products (Tr. 5). Within two or three weeks after he answered the advertisement he received a telephone call from a gentleman who identified himself as an Econo-Car representative and asked for an appointment to meet

with Taute and his wife, Rayetta.

At that time Taute was merchandising manager and director of retail operations for Ryan Grocery Company in Billings (Tr. 26).

As a result of the phone call Taute and his wife met with a Mr. Burko, who represented himself as an Econo-Car representative responding to Taute's letter in answer to the ad (Tr. 27). They met in the Esquire Motel in Billings and there Mr. Burko had with him a Mr. Alvarez, whom Mr. Burko introduced as being on the national sales staff of Econo-Car, being trained for a sales position. (Tr. 28)

Mr. Burko explained to the Tautes that Billings had been chosen as one of the towns that could support a car rental operation. Using a blackboard he demonstrated to the Tautes how they could make a profit on a 15 car operation in Billings, using their method, their tools, their resources, and following the general instructions to be supplied by Econo-Car (Tr. 29).

After some other discussion at this first meeting in the Esquire Motel, Burko produced a blank form of contract entitled "Econo Dealer Appointment Program and Agreement" which is the same as Exhibit 6 in this action. He suggested that the Tautes take the agreement home with them to study it and return in a few days. He also gave them names of two or three dealers with whom they might verify whether Econo-Car was doing the things that Econo-Car claimed. No contract was made by Taute with these persons (Tr. 33).

Two or three days later Taute and his wife received a phone call from Mr. Burko, and again a meeting at the Esquire Motel was arranged. The same persons attended the meeting, Mr.

Taute, his wife, Mr. Burko and Mr. Alvarez.

Taute brought with him to this second meeting the blank agreement and the list of questions concerning the various clauses in the contract. They then proceeded to take the contract item by item. The Tautes asked questions and Burko answered them for them. (Tr. 34)

We will not burden this Court with a recitation of what happened in that conversation, the representations that were made, and the statements that were made by Mr. Burko to induce Taute to sign the contract which became Exhibit 6. Since Econo-Car is also appealing in this action we expect that we will be called upon to make a statement with respect to that conversation in our responsive brief to Econo-Car and no useful purpose would be served in repeating that conversation here. It is enough to say that eventually the jury determined that Econo-Car, through Mr. Burko, had made representations to Taute which turned out to be false and awarded him a verdict on the second claim, which related to those false representations.

Taute's first claim in this action relates to the breaches of the contract, Exhibit 6, and the related instruments thereafter executed, which resulted in damage to Taute above and beyond the damages he sustained by reason of the fraudulent deceit of Econo-Car. We will concern ourselves with those breaches in this statement of the case.

When Taute was induced by the deceit of Econo-Car to sign Exhibit 6, he nevertheless thought that the contract itself would be performed by Econo-Car. Experience proved this to be untrue. Taute contends, and the evidence sustains him, that Econo-Car breached every important provision of Exhibit 6 and

the supporting lease, Exhibit 7, in such manner as to prevent Taute from continuing in the business, and to drive him out of it, because he had no agreement with Econo-Car upon which he could rely for the continuation of the rental car business in Billings. The following are some examples:

(1) Number of Months for Which Taute Could Lease Individual Cars:

In Schedule B of Exhibit 6, it is provided in paragraph 2:

> "* * * Each lease shall run for a minimum period of twelve months to a maximum of eighteen months* * *. The ECONO-DEALER shall execute a standard form of ECONO-CAR LEASE AGREEMENT before delivery of any vehicles."

Taute understood from this language that the option would be given to him as to how many months past the minimum period he would be allowed to rent the automobile. However, in August of 1963, he signed Exhibit 7, which is dated July 10, 1963, which provides the option in the Lessor (Econo-Car) as follows:

> "The term of this lease is for a period of eighteen months from the date of delivery (see attached rider) of the vehicle to Lessee, except that Lessor shall have the absolute right, in its sole discretion, to terminate the lease at any time following the twelfth month, provided that Lessor makes available to Lessee a similar replacement vehicle of the then current model year, for a like term of eighteen months, and at an identical rental* * *."

Thus by Exhibit 7, which was not displayed to Taute when he executed the franchise agreement, it was agreed between the parties that the option as to the number of months after twelve months for each vehicle would remain in Econo-Car. However, Exhibit 7 provided for a minimum of twelve months for each automobile and it further provided that replacements would be made on termination of another vehicle for eighteen months.

These contractual provisions were important to Taute because of the property tax situation on automobiles in the State of Montana. New cars are not subject to property taxes, in the first year or year of purchase. Thus a new car brought into Montana in 1963 is not subjected to property taxes until February 15 of the subsequent year, 1964. Knowing this, Taute wanted to arrange his rental fleet so as to be able to bring in new cars for his rental operation before February 15 of each year. This would mean a saving of about $40 per automobile per year;on a ten car fleet, the saving would be substantial.

Taute's original fleet of ten cars were delivered to him by Econo-Car in the month of October and November of 1963. It was Taute's plan to license them of course for 1963 at the cheap no property tax rate; then license them for 1964, paying the property taxes; and then trade them in to Econo-Car between January 1 and January 15, 1965, so that he would avoid property taxes on the used cars and would not have to pay property taxes on the replacements under the Montana tax laws. He was prevented, however, from executing this plan because Econo-Car unilaterally changed the leasing terms on the number of months he could hold the cars.

Thus in November, 1963, Taute received a "rate revision"

(Exhibit 9, sheet 3) which provided that effective December 1, 1963,

> "All 1964 automobiles will be available on a twelve month leasing term (instead of the previous eighteen). Either party may, however, extend the term for up to two months* * *."

The so-called rate revision was put into force by Econo-Car unilaterally. Taute was not asked to consent. Taute could have lived with this provision, however, because he had an option to extend to two months. Econo-Car, however, did not stand by this provision. On September 29, 1964, when he had the vehicles in his fleet less than a year, he was told that Econo-Car would pick up three of his automobiles.

On October 5, 1964 (Exhibit 10) he was notified by Econo-Car that all 1965 automobiles would be delivered to him on a six month lease term, which could be extended by Chrysler leasing without Taute's consent, of one month. Since 1965 automobiles were to be replacement for 1964, Exhibit 10 was in direct contravention of Exhibit 7 which provided that leasing terms for replacement vehicles would be eighteen months in duration.

Taute brought the situation to the attention of Econo-Car (Exhibit 11, sheet 3). He informed them of the taxing situation and of the desire to trade his cars in in the month of January, 1965. He was given no assurance on this particular. Econo-Car entirely disregarded the replacement provisions of Exhibit 7, the leasing agreement between them.

(2) The Provision for Insurance:

Obviously collision and liability insurance are of

vital consideration to a person in the case of a rental car business.

Paragraph 4E of the franchise agreement, Exhibit 6, provided:

> "Econo-Car, in consideration of the payments, will provide collision insurance 'with no more than $100 deductible' and physical damage insurance, including fire and theft and combined additional coverages with $50 per loss deductible."

Under the franchise agreement the insurance was to be provided at no additional cost to Taute.

Yet, on December 26, 1963, Econo-Car unilaterally added $5.00 per month per car to the payments to be made by Taute, for insurance (Pl. Exh. 13). Then on September 2, 1964 (Exh. 13, sheet 2) Econo-Car informed Taute that they were changing the collision insurance coverage from $100 deductible to $250 deductible. This had the effect of increasing Taute's risk on the automobiles in his fleet from $1,000 to $2,500 with the automobiles that he had on the road.

Taute addressed a letter to Econo-Car (Exh. 14) asking if the $250 deductible collision coverage was mandatory. Taute was emphatically informed by Econo-Car that it was mandatory (Exh. 14, sheet 2).

(3) Turn-in Costs for Vehicles:

Another important element of the leasing agreements was the turn-in cost that was to be assessed Taute for wear and tear on the leased vehicles.

Under the franchise agreement nothing was stated in Schedule B of Exhibit 6 with respect to turn-in costs. However,

that agreement did say that a "standard form agreement would be executed before the delivery of any car."

The lease form which was executed between the parties is Exhibit 7. Paragraph 11 of that agreement provided:

> "Upon the expiration of this lease, * * *, Lessee shall deliver to Lessor or its designee the vehicle, including five (5) usable tires, as well as any extra equipment of the vehicle* * * and is as good condition as when delivered, ordinary wear and tear and bona fide rent-a-car business excepted* * *. Tire costs shall be restricted to bald or missing tires."

Thus the provisions of Exhibit 7 confirmed Taute's understanding, to-wit, that ordinary wear and tear were not his respondibility and that he would not receive charges for tires unless they were bald or missing. His understanding was confirmed by Exhibit 8, apparently provided by Chrysler Leasing Corporation with respect to inspection of leased vehicles. In that exhibit ordinary stone chips, bumps or scratches or minor dents would be excepted, and tire wear would not be considered a lessee responsibility unless it was evident he had failed to maintain proper alignment of the front wheels.

When Taute turned in his first automobiles, at the request of the Lessor, he was assessed for charges on the condition of the automobiles that were not within the leasing agreement. He protested to Econo-Car (Exhibit 12) and the matter was satisfactorily taken care of for Taute. However, again unilaterally, Econo-Car proposed changes in the lease terms with

respect to turn-in conditions (Exh. 16). Again these changes were unilateral and in contravention of the provisions of Exhibit 7.

(4) Advertising:

Again it is obvious that advertising is an important part of the rental car business. Provision was made for advertising in the franchise agreement.

Paragraph 4F of the franchise agreement provided that Econo-Car would pay each dealer, in this case Taute, an advertising allowance of $7.50 per month per automobile operated by him provided that Taute advertise locally a minimum amount of $15.00 per car. Having Taute handle the advertising on a local basis was advantageous because they avoided national advertising rates in that manner.

The advertising arrangement went through a variety of changes, all unilaterally instituted by Econo-Car.

In Exhibit 15 Taute was called upon to handle the advertising through an advertising agency selected by Econo-Car, though the advertising would still be on a local basis.

On August 31 (Pl. Exh. 18) Econo-Car postponed all advertising for the entire month of September. On November 4, 1964, Taute received Plaintiff's Exhibit 20, which informed him that Econo-Car was instituting a 25% reduction in costs, including its advertising schedule, and that it would advertise only on 75% of Taute's fleet, in effect cutting down the Econo-Car budget from 10 cars to 7½ cars. This had the effect of reducing the advertising by 25% per month.

Taute felt that the reduced advertising was affecting his business and requested additional advertising subsidy from Econo-Car, but was refused. Eventually the company went back to

its original advertising deal, but after Taute had submitted his letter terminating the contract and franchise agreement.

THE FOREGOING examples are given to show that the franchise agreement, Exhibit 6, and the lease agreement for automobiles Exhibit 7, had no real meaning to Econo-Car, and it changed the provisions of those agreements whenever it felt inclined. Taute in the meantime was struggling to make his rental car operation in Billings a success. He perceived that a substantial source of rental car business would be from persons using the Billings airport, and accordingly made arrangements to bid, and did bid successfully on a location in the airport terminal in Billings. Before he effectuated the lease for the airport facilities, however, Econo-Car was undergoing such drastic changes in its method of operation in the fall of 1964 that it became apparent to Taute that he could not rely on any of the provisions of his franchise agreement or the leasing agreement, and that he really had no definite contract, as far as Econo-Car was concerned, which would tell him where he stood with respect to the future in the rental car business. Cost after cost was being passed on to Taute by Econo-Car and with each additional cost his margin for success was being substantially reduced. So it was then when Econo-Car proposed to change the turn-in provisions so as to increase the cost to Taute he determined that it was the straw that broke the camel's back and served his letter of termination of the franchise agreement (Exh. 21). Taute illustrated his difficulty, using a Valiant automobile as an example (Tr. 105, et seq.) and set forth his difficulty:

"Q. Now then, with respect to the time when you were coming up to the point where you were

going to -- where you decided you had to eliminate or get out of this business, what additional costs were you facing now with respect to this Valiant?

A. I was facing increased costs in the area of tires; increased costs in the area of car condition at turn-in time; increased costs of maintaining more expensive equipment than I had originally bargained for; increased tax cost on this more expensive equipment and-- let's see there was --

Q. Well, you had the problem about the deductible, did you not?

A. And increased costs in the event of an accident."

(Tr. 108, Lines 10-18)

Taute was in the car rental business for Econo-Car from October 23, 1963, until February 15, 1965. In this period of time he ran the business entirely, devoting many hours per day to it. He had the managerial responsibility, the promotional responsibility, the advertising responsibility, the collection work, the contract negotiations and the dealing with Econo-Car. He delivered cars, washed cars, and made minor repairs. His wife worked with him in the business (Tr. 113).

In the time that Mr. Taute was involved with the dealership, he sustained an operating loss of $2,521.56; and he contributed $8,934.00 in investment, not considering the franchise costs, to the venture (Tr. 124). In addition, at the time that he signed the franchise agreement, his employment with Ryan

Grocery showed him capable of earning the sum of $15,000 per year.

These are the sums that Taute lost; yet, under the instructions of the Court the jury was so limited that it could bring in nothing more than $1,052.00 on Taute's claim in his favor. Manifestly this result is unjust.

(d) Specifications of Errors

1. The trial court erred in instructing the jury as follows:

> "Now with respect to the breach of contract, the plaintiff says that the contract, as explained by the evidence which was introduced, was violated by the defendant, and he complains in these respects: One, that the provision of the contract with respect to advertising were violated; two, that the provisions of the contract with respect to insurance were violated, and, three, that the defendant changed the leasing agreement for the automobiles to be used by the plaintiff and thereby increased the cost to the plaintiff.
>
> "The plaintiff has failed to prove that the advertising agreements were not honored, and therefore he may recover no damages on that account.
>
> "With respect to the change in the insurance program you are instructed that it was the duty of the defendant to provide, without charge, collision insurance with one hundred dollar deductible. And I am satisfied that you know

what a deductible policy is. Simply means that in the event of a collision and damage the insurance company does not pay the first hundred dollars. Now, unless you find that the defendant proposed an insurance change to which the plaintiff consented, and this could be proved by an oral agreement, as well as by letters or writings, then you may award the plaintiff the damage which he sustained. This damage would be measured by the premium charged for the months it was charged, plus the difference between the value of a collision policy with a one hundred dollar deductible clause and a policy with a two hundred fifty dollar deductible charge. This again spread over the months that the two hundred fifty dollar deductible policy was in force prior to the termination of the contract which was on February 15, 1965.

"With respect to the claimed breach of the leasing agreement, in this connection I instruct you that unless the plaintiff proposed a change to which the defendant agreed, then it was the duty of the defendant to provide automobiles to the plaintiff for a period of eighteen months after the initial dates of delivery. In this connection nine cars were delivered on October 23, 1963, and one car on November 1, 1963. Now, if you find that by reason of the

changes in the lease terms, and specifically I refer to the length of the term of leasing or the turn-back provisions, and again I instruct you that it is necessary that these changes be not consented to by the plaintiff, and if you find that he suffered damages, then you may award him such damage as you may find from the evidence that he did suffer. In this connection, however, I should advise you that the defendant's obligations under exhibit six and seven expired within a few days of April 30, 1965, and so any change in leasing arrangements wouldn't be -- you couldn't consider any damages based upon a projection beyond that time."

(Tr. 283, Lines 1-25;
284, Lines 1-22 inc.)

To which the plaintiff made objections as follows:

"With respect to Instruction Number Two. That portion thereof which states that the plaintiff is not entitled to recover because the advertising agreements were not honored is not true and is not founded on the evidence. There being evidence that there were months in which no advertising was performed and other months in which it was performed in a manner different than the contract. And again an invastion of the province of the jury with respect to that particular portion. That

there is no evidence upon which the jury can determine the difference in value between the collision policy and one hundred dollar deductible and one of two hundred fifty dollar deductible.

"That the third portion of the Court's Instruction Number Two relating to the change in the leasing agreement does not take into account the fact that under exhibit seven, if it were a valid, modified contract existing between the parties, would require the replacement vehicles to be of eighteen months term, and that the position the plaintiff found himself in on November 15, 1965, was that despite the provisions of exhibit seven the vehicles were coming to him on a six month term on an agreement which -- under an arrangement to which he had not consented. That the proposed instruction does not take into account the fact that the plaintiff in this case, Mr. Taute, at the time he terminated the arrangement was faced with a situation of accumulations in the leasing agreement were such that all taken together they were so material and interdependent as to constitute a violation of the whole contract by Econo-Car that he had a right then to recover for the breach of the whole contract and not simply limited as the Court's Instruction Number Two limits him to

damages for breaches, for particular breaches of the contract. That instruction, again, is not the proper instruction on the measure of damages as far as breach of the contract is concerned, because he was entitled to recover all of the loss to which he has been put under -- is entitled to recover such amount that would compensate him for all of the detriment approximately caused by the whole breach of the contract by Econo-Car, and the jury is not so instructed. As such the Court is not instructing the jury on plaintiff's theory of the case, or is instructing it in an incomplete and insufficient manner and is invading the province of the jury with respect to the right of recovery in the case."

(Tr., 272, Lines 4-25;
273, Lines 1-19 inc.)

And to the further objection of the plaintiff as follows:

"Also object to the failure of the Court to instruct on the element of damage on out-of-pocket rule, and asks the Court to so instruct the jury.

"Object to the statement that the obligations of the defendant expired on April 30, 1965, for the reason that it ignores the

eighteen month replacement provision in exhibit seven."

(Tr., 285, Lines 24-25; 286, Lines 1-5 inc.)

2. The Court erred in failing to give Plaintiff's Offered Instruction No. 13, after a request therefor by the plaintiff, in words and figures as follows:

"You are instructed that the measure of damages for a breach of contract is such amount as will compensate the party aggrieved for all of the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom."

3. The Court erred in failing to give Plaintiff's Offered Instruction No. 16, in words and figures as follows:

"In determining the amount of damages, if you find from a preponderance of the evidence and under these instructions that Taute is entitled to a verdict, you should consider, allow for, and make just compensation for the moneys, if any, laid out and expended by him as capital contributions to or expenses incurred for the operation by him of the Econo-Car business, less any value accruing to Taute from such operation or business.

"You should also consider, allow for and make just compensation for the reasonable value of the services and time expended by him in the operation of the Econo-Car business which

you find from a preponderance of the evidence was brought about by the misrepresentations of the defendant or by breaches of contract, if any, by Econo-Car.

"If you find from the evidence that after Taute brought the operation of the Billings Econo-Car business to a halt he was thereafter forced to undergo a period of enforced idleness which was proximately caused by the actions or omissions of the defendant Econo-Car under the evidence and instructions in this case, you should award him the reasonable value for the earnings he might reasonably be expected to earn otherwise during such period of enforced idleness.

"The amount sued for in the complaint should not be taken by you to be a criterion of the amount of your verdict for the plaintiff. You should set your award, if any, in the full amount that you find from a preponderance of the evidence, but in no event shall your award exceed the sum of $________, the amount sued for in this action."

4. The Court erred in failing to give Plaintiff's Offered Instruction No. 12, after request therefor by the plaintiff, in words and figures as follows:

"If you find from a preponderance of the evidence that Taute was induced to enter into

the contractual relationship with Econo-Car by virtue of the misrepresentations, if any, of Mr. Burko and Mr. Alvarez, then Taute, under the law, had the right to elect to continue performance of the remainder of the contract on his part, and he is not thereby deprived of his right to recover from Econo-Car for the damages, if any, which were proximately caused him by such misrepresentations. Such an election to continue the contract by Taute would have the effect of requiring both parties to perform the conditions required of them under the remainder of the contract. Thereafter, if Econo-Car were guilty of further breaches of the contract, and you find from a preponderance of the evidence that such breaches, though not so large by themselves, when taken together were so material and interdependent as to constitute a violation of the whole contract by Econo-Car, then Taute had the right to treat the whole contract as breached, and to recover from Econo-Car such damages as the law allows."

5. The Court erred in entering its Order dated September 18, 1967, denying plaintiff's Motion for a New Trial as to the First Claim.

6. The Court erred in refusing Plaintiff's Offer of Proof Number Two, in words and figures as follows:

"MR. SHEEHY: This is offer of proof number two, Plaintiff's Offer of Proof Number Two.

"Comes now the plaintiff and offers to prove by the witness, Carl Taute, now on the stand, and if allowed to testify his testimony would prove that in Billings at the Esquire Motel in the month of June of 1963, in the presence of Mr. Alvarez and in the presence of Carl Taute and Mrs. Taute, Mr. Burko projected for Mr. Taute the income that he might be able to expect from the operation of a franchise arrangement under the Econo-Car System in Billings such as was being proposed to Mr. Taute at that time, that the projection for a fifteen car operation was the sum of one thousand dollars per month per car, and that for a ten car operation the income per month per car would be somewhat less, but that he might expect to build to a thousand dollars per month in short order, in words to that effect; that this statement was made unsolicited by Mr. Taute; was made for the purpose of explaining to him what the possibilities were as to income under this arrangement, and as part of the whole conversation which led to the conversations-- I should say which led to the signing of the

contract on or about June 28, 1963. And we so offer this testimony in evidence.

"THE COURT: Do you have any objections to that offer of proof?

"MR. DALTHORP: Yes, Your Honor; first one being that it is outside of the scope of the pleadings. Secondly, that it is pure dealers' talk in the sellinf of a franchise. Third, that it is offered to vary the terms of a written contract, and forth, that it is a promise as to future events which, if at all, was made prior to the execution of a written contract purporting to combine all of the agreements of the parties and actually, I don't think, even as stated, that it was in the terms of a promise, but a general representation.

"THE COURT: The objections are sustained."

(Tr. 120, Lines 22-25;
121, Lines 1-25; 122,
Lines 1-5 inc.)

(e) Argument of the Case

SUMMARY:

The jury by its decision found that Econo-Car had breached the franchise agreement in several respects. The jury awarded all the damages it could award under the limited instructions of the Court.

The Court's instructions prevented Taute from recovering a proper measure of damages for the breach of the contract in this case.

The franchise agreement provided that it was to be construed and enforced according to New Jersey law. New Jersey follows the common law rule that recoverable damages for breach of contract are such as may reasonably be supposed to be in the contemplation of the parties at the time they made the contract. New Jersey allows as a measure of damages for breach of contract such amount as will compensate the party aggrieved for all the detriment proximately caused by the breach, or which in the ordinary course of things would be likely to result therefrom.

The evidence showed the plaintiff to be out-of-pocket under the franchise agreement the following amounts:

Contributions to capital	$8,934.00
Operating Loss	2,521.56
Total	$11,455.56

The foregoing total does not include the $6,000.00 Taute paid as a franchise fee, nor does it include anything for the reasonable value of his services in the time that he was employed in trying to make the franchise work.

The several breaches of contract by Econo-Car were such as to make the whole franchise agreement wholly impossible

to Taute, and to prevent his performance of the franchise agreement.

The Court by its instruction limited damages for breaches and the small dollar amounts flowing out of those breaches, without regard for the fact that the breaches collectively, and interdependently, had a cumulative effect of breaching the whole contract.

The result is that the plaintiff Taute is unjustly and inadequately compensated for the damages which he sustained by virtue of Econo-Car's breaches. The decision on the First Claim should be reversed and sent back for a new trial on the issue of damages.

<u>ARGUMENT</u>:

Plaintiff Taute filed his complaint against Econo-Car alleging two claims for recovery, one based upon fraudulent inducement to enter the franchise agreement, and the second for breaches of the franchise agreement by Econo-Car which damaged him.

The Court submitted both claims to the trial jury for decision. The jury found that Econo-Car was indeed guilty of fraudulent representations in inducting Taute to enter into the franchise agreement and awarded Taute $6,000.00 on that claim, the limit fixed by the Court.

The trial jury also brought in its verdict of $1,052.00. Thus the jury also found that Econo-Car was indeed guilty of breaches of the contract into which it had fraudulently led Taute. The jury, however, by the court's instructions, were limited to small dollar amounts because the court made the several breaches independent instead of interdependent. The court ignored the

cumulative effect of the breaches and the fact that they forced Taute out of his franchise agreement. The jury in effect awarded everything it could award under the court's instructions on the second claim.

The Court's position ignored the fact that the continuing and respective breaches of the contract had put Taute in the position where he could not go forward with the franchise arrangement. Taute's testimony is clear on this point:

> "Q. Now then with respect to the time when you were coming up to the point where you were going to -- where you decided you had to eliminate or get out of this business, what additional costs were you facing now with respect to this Valiant?
>
> A. I was facing increased costs in the area of tires; increased costs in the area of car condition at turn-in time; increased costs of maintaining more expensive equipment than I had originally bargained for; increased tax cost on this more expensive equipment, and let's see there was --
>
> Q. Well you had the problem about the deductible, did you not?
>
> A. And increased insurance costs in the event of an accident.
>
> Q. Now the price you were paying for the Valiant was a hundred fifteen fifty at this time as compared to a hundred twenty-nine dollars?
>
> A. Yes.

Q. Did that price itself have any compelling effect on you with respect to continue staying in the business?

A. No, I didn't feel that it was enough to justify the increased risks we were taking -- enough of a reduction.

Q. Did you then eventually decide to terminate your relationship with Econo-Car?

A. Yes."

(Tr. 108, Lines 6-25;
109, Lines 1-4)

A good example is the Court's charge with respect to the changes in insurance. The Court charged the jury in the instruction to which we have objected, that the damage for the insurance changes would be "measured by the premium charged for the month it was charged plus the difference between the value of a collision policy with $100 deductible and a policy with $250 deductible charge." (Tr. 283, 284) The Court limited damages on this item to the termination of the contract on February 15, 1965 (Tr. 284).

Thus in its charge, under the evidence the jury could award to Taute a small dollar amount, amounting to approximately $5.00 per month from December 26, 1963 (Pl. Exh. 13) to February 15, 1965, the date of the termination of the contract, a period of something over fourteen months.

Would such a sum adequately compensate Taute for the damage done to him by virtue of the breach of the insurance covenants and the franchise agreement? Obviously not. The increase in dollar cost was not the real damage to him; it was the increase

risk that he was facing with every car that he placed on the road in the rental market. Where formerly he was at risk for $100 for each car, that risk increased to $250 for each car. On his ten car fleet it meant that he had a possible $2,500 of risk for accidents on his rental cars as opposed to a $1,000 possibility. As a businessman, Taute had to make a determination whether he could afford to take the risk of losing that additional money any time an accident occurred to any car. Awarding him the difference in premium between a $100 deductible and a $250 deductible policy does not adequately remedy the breach. The breach of the insurance contract had the effect of making Taute's continued operation of the franchise a quite risky matter to him. In Exhibit 6 Econo-Car had agreed to provide him with $100 deductible collision insurance cost-free to Taute. Instead it was supplying him with a $250 deductible insurance policy at a cost of $60.00 per year per car additional to Taute. The breach was not only material to the premium cost to Taute; it was material to the whole franchise agreement. Yet, the Court's instructions prevented him from making a recovery against the defendant for all of the damages he suffered by virtue of the breach of the whole franchise agreement.

A second breach of the franchise agreement which materially affected the whole franchise as far as Taute was concerned was the number of months that he could depend on for having each individual car in his possession.

The only agreement affecting the length of time that the cars were to be in the possession of Taute was Exhibit 7, the lease agreement. Under the caption "Term" that agreement provided:

"2. The term of this lease is for a period of eighteen (18) months from the date of delivery SEE ATTACHED RIDER of the vehicle to the Lessee, except the Lessor shall have the absolute right, in its sole discretion, to terminate the lease at any time following the twelfth month, provided that Lessor makes available to Lessee a similar replacement vehicle of the then current model year for a like term of eighteen months, and at an identical rental* * *."

Exhibit 7 was in full force and effect between the parties. Its provisions were never amended or rescinded by the mutual consent of both parties. However, its provisions were totally ignored by Econo-Car. Yet this is the only agreement between the parties under which Econo-Car made delivery of automobiles to Taute.

It is clear from the provisions of Exhibit 7 above quoted that Econo-Car could not terminate the lease of any car within the twelve month period after delivery; it is further clear that between the twelfth month and the eighteenth month it could so terminate the term as to any individual car but it had to make available to Lessee a similar replacement vehicle of the then current model year for a term of eighteen months and at identical rental.

Thus Econo-Car's agreement was to provide each vehicle for at least twelve months; its further agreement was that if it took the vehicles between the twelfth and the eighteenth month it would provide a similar vehicle at identical rental for an addi-

tional eighteen months.

No other reading of the lease term is possible without doing violence to the language of the instrument between the parties, Exhibit 7.

Yet the Court, in the instruction to which Taute has objected, told the jury that Econo-Car's obligations under Exhibits 6 and 7 expired within a few days of April 30, 1965. Manifestly this date was incorrect. The Court in its charge correctly stated that nine cars were delivered to Taute on October 23, 1963, and one car on November 1, 1963 (Tr. 284). Under the express terms of Exhibit 7 if Econo-Car intended to pick up the automobiles after one year, that is, after October 23, 1964, it would have to provide Taute with an identical car under identical terms for an additional eighteen months. None of this was done. The additional eighteen month period would have carried over until April of 1966, a year later than the Court's instruction provided.

Under Schedule B attached to Exhibit 6, in paragraph 2 of that schedule, it was set forth as an essential part of the franchise agreement that "each lease shall run for a minimum period of twelve (12) months to a maximum of eighteen (18) months. Under Exhibit 6, therefore, any lease offered to Taute should have been for a minimum twelve months with a maximum of eighteen months. What did Econo-Car do in this connection? The record is replete with Econo-Car's proposals to Taute for leases on a six month basis on a take-it-or-leave-it basis (Exhibit 10; sheet 3, Exhibit 9; sheet 2, Exhibit 11; Exhibit 16); and moreover, at no time did Econo-Car recognize any obligation to Taute to replace his vehicles with identical vehicles for an eighteen

month term under Exhibit 7.

These were important matters to Taute. Under the Montana taxing laws if a car is licensed in December it must be relicensed again in January or February, and at the second licensing a personal property tax is collected. It meant the difference of about $40 per car per year on the more expensive cars (Tr. 58,59).

Taute wanted to arrange the scheduling of the replacement vehicles so that he could take advantage of the tax laws and save the property tax on each car. If an arrangement could be made so that he would get new cars between January 1 and February 15 in each year, he would have to pay only a new car tax on each vehicle and avoid the property taxes when re-licensing time came around the following year.

It is obvious under the evidence that the provision for the lease term in Exhibit 7 and in Exhibit 6 meant nothing to Econo-Car. It did not feel bound by any provision requiring a twelve to eighteen month lease for each individual car. The matter of this breach of course was material to the whole contract as far as Taute was concerned. Yet, under the instruction of the Court no damage on this item could be found for Taute. Certainly, if any provision was material to the franchise agreement, the lease term on the rented automobiles was a material provision. It went to the heart of the contract. The trial court did not recognize this, however, and did not agree that a breach of the lease term provisions might constitute a breach of the whole contract and entitle Taute to all of the out-of-pocket damages that he sustained by virtue of such breach of whole contract.

What we have said with respect to the lease term

provisions of Exhibit 6 and Exhibit 7, also pertains to the turn-in provisions of those instruments. We speak now of the cost that would be accruing to Taute on damages to rental vehicles for which he might be assessed at the termination of the lease, when the individual vehicles were returned to the lessor, Econo-Car. (There is much reference in the evidence to Chrysler Leasing. Apparently Econo-Car had an arrangement with Chrysler Leasing under which it got automobiles and supplied them to its franchisees. Chrysler Leasing was blamed for much of the difficulty that Taute was facing with respect to turn-in provisions and other provisions of this contract. That, however, was not Taute's problem; it belonged exclusively to Econo-Car).

Under the original turn-in provisions of Exhibit 7 (paragraph 11, Exhibit 7) Taute was not to be assessed for any condition of the returned vehicle due to ordinary wear and tear and he would be assessed for tires only if they were bald or missing. We have already set forth for the Court in pages 8, 9 and 10 of this Brief how substantially those provisions were ignored and changed by Econo- Car. It is enough to say at this juncture that as far as the contractual provisions of Exhibits 6 and 7 were concerned, Taute stood on shifting sands. He had no way of prognosticating what his turn-in costs were going to be. He knew from his experience with the car that he had turned in that he would be assessed for costs not properly belonging to him. His margin of safety in doing business was being substantially reduced. Here again there was a breach of the contractual franchise arrangement which had the effect of driving him out of business. But under the Court's instruction on breach of contract, Taute could recover nothing for this most substantial breach

This case was tried in Montana where ordinarily the Federal Court, under Erie, would apply the Montana law. However, the franchise agreement, Exhibit 6, provided in paragraph 15 thereof, that "this agreement shall be construed and enforced in accordance with the laws of the State of New Jersey* * *."

There is, however, no substantial difference between the damages under New Jersey law for a breach of contract, and that of the State of Montana.

Montana has a statutory provision which says:

> "17-301. (8667) Measure of Damages for Breach of Contract. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things would be likely to result therefrom."
>
> Sec. 17-301, Revised Codes of Montana, 1947.

Taute offered the Court an instruction (Plaintiff's Offered Instruction No. 16) expressly phrased in the language of this statute. The court refused to give it (Specification of Error No. 2, page 18 of this Brief).

The New Jersey law supports the proposed instruction. In Patco Products v. Wilson (N. J., 1950), 76 A.2d 677, 679, it was stated:

"* * * Thus was the defendant's breach accentuated and emphasis given to the common law rule that the recoverable damages are such as may reasonably be supposed to be in the contemplation of the parties at the time they made the contract (citing cases)* * *."

And in Apex Metal Stamp Co. v. Alexander & Sawyer, Inc. (N. J. 1957) 138 A.2d 568, 571, the New Jersey court said:

"The defendant's argument that plaintiff's damages were uncertain and insufficient so as to preclude an award is without merit. In discussing this question it is necessary to distinguish between uncertainty as to the fact of damage and uncertainty as to its amount. See 5 Williston, Contracts (Revised Edition 1937) Sec. 1346, page 3778; 5 Corbin, Contracts (1951), Sec. 1022, page 119; Restatement, Contracts, Sec. 331(1), page 515, comment (a) (1932); Annotation 'Uncertainty as to Damages' 78 ALR 858 (1932). The facts in the instant case clearly establish that damage did result; the amount of the loss may be calculated with reasonable certainty, though not precisely. Where it is certain that damage has resulted and the evidence affords a basis for estimating the damage with some degree of certainty, recovery is allowed (citing cases)."

138 A.2d, page 571

Furthermore in New Jersey, where a plaintiff was prevented from performing his part of a contract through the fault of the defendant, the New Jersey court allowed recovery of damages. The case involved ~~a contract~~ AN ACTION against a municipality for work done and materials furnished under a contract, but the principle is the same. That case is Cavanagh v. Borough of Ridgefield (N.J. 1920) 109 A. 515.

The Cavanagh case, supra, is analagous to the case at bar for another reason. In this case plaintiff Taute wrote a letter terminating the contract (Exh. 21) pursuant to the provisions of the franchise agreement. Defendant contended that this was in effect a waiver of any damages. In Cavanagh, however, it was contended that the plaintiff had consented to a rescission of the contract because he had notified the defendant "you have stopped us and refuse to pay; very well we submit a claim for what we have done". The New Jersey court held that this was not technically a rescission but merely an acceptance of the situation which was brought about by the fault of the defendant. The court approved the action of the trial judge in charging the jury accordingly. (109 A. at page 516, 517)

In Tanenbaum v. Francisco (N.J. 1933) 166 A. 105, in the syllabus written by the court it is stated:

> "It is well settled that, whenever one party to a contract prevents the other from carrying out the terms thereof, the other party may treat the contract as broken and abandon it, and is entitled to such profits as he would have received had there been a complete performance. Such abandonment

is not a rescission of the contract, but is merely an acceptance of a situation created by the wrongdoer."

Under the New Jersey law then it is clear that one who is prevented from performing a contract may claim a breach of the whole contract. In this case the defendant's actions with respect to turn-in costs and lease term, and indeed for advertising and insurance, were such that Taute was entitled to treat the contract as broken and to abandon it.

Moreover, under Tanenbaum, plaintiff should have been allowed to prove the profits which he might reasonably have expected to receive. In Exhibit 22, there is set forth an expectable profit per car from Econo Dealers' Reports of $67.00 per month per automobile. Plaintiff moreover made an offer of proof (Offer of Proof Number Two, Tr. 120) which related to a representation by Mr. Burko, the agent of Econo-Car, that in a ten car operation the result in income to Taute would be $1,000 per month. We have assigned as a specification of error No. 6, the refusal of the Court to allow Taute to prove profits which were reasonably ascertainable, both under Exhibit 22, and the Offer Of Proof Number Two. The profits, we would expect, would include the reasonable value of the services that Taute provided in the venture, along with his wife Rayetta.

Damages for loss of profits, therefore, may be recovered in New Jersey, and in Montana as well, where it is shown that such loss is the natural and direct result of the act of the defendant complained of, and that the amount is certain and not speculative. See Cruse v. Clawson (Mont. 1960) 352 P.2d 989, 994.

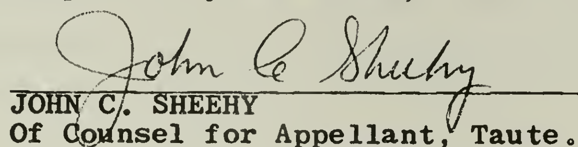
This Court has before it a situation where the plaintiff Taute, prevented from performing the franchise agreement that he thought he had, without fault on his part, has been deprived of the damages to which he was put by the acts of the defendant. He comes to this Court seeking redress for the inequity of the verdict in the light of his damages.

We close our argument by pointing to the language in 25 C.J.S. 867, Damages, Sec. 78, as follows:

> "Where, without fault on his part, one party to a contract who is willing to perform it is, by the other party prevented from doing so, he is entitled to be placed in as good a position as he would have been had the contract been performed. The primary measure of damages is the amount of his loss, or, as it has been otherwise expressed, the value of his contract, see supra Sec. 74, which may consist of two items, the one being the party's reasonable outlay or expenditure toward performance, deducting however in computing the damages, the value of the materials on hand, and the other the anticipated profits which would have derived from performance. When a plaintiff sues on a contract to recover the amount he would have received for the full performance prevented by defendant's breach, he seeks in effect to recover as damages the profit from performance of the contract, which profit defendant's breach prevented him from earning* * *."

We therefore respectfully submit that in view of the inadequacy of the verdict, which was directly the result of the refusal of the trial court to instruct properly the jury with respect to damages that plaintiff is entitled to have the case returned for further trial on the issue of damages with respect to the First Claim of his Complaint.

Respectfully submitted,



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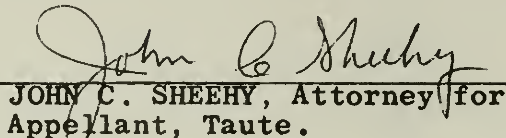
CERTIFICATE

John C. Sheehy, an attorney duly authorized to practice in the United States Court of Appeals for the Ninth Circuit, states as follows:

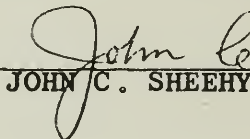
I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



JOHN C. SHEEHY, Attorney for Appellant, Taute.

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of April, 1968, I deposited in the Post Office at Billings, Montana, in an envelope securely sealed, with postage thereon prepaid, three copies of the within and foregoing Brief of Appellant Taute, addressed to George C. Dalthorp, Esq., Crowley, Kilbourne, Haughey, Hanson & Gallagher, 500 Electric Building, P. O. Box 2529, Billings, Montana 59101.



JOHN C. SHEEHY

(f) Appendix

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